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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Jeffrey M. Tzerman, Master-In-Equity

Appellate Case No.: 2022-001041

Elizabeth A. Farmer……………………………………………………….Respondent,

v.

James Timothy Short……………..…………………………………………Appellant.

INITIAL BRIEF OF APPELLANT

Respectfully submitted,

s/Michael D. Wright

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<u>**STATEMENT OF ISSUES ON APPEAL**</u>

I. Did the master err in failing to award damages for ouster when the only testimony in the record demonstrates Respondent's clear intentions to deny Appellant's ability to access the property and Respondent had exclusive use and access of the subject property?

STATEMENT OF THE CASE

On July 17, 2020, Elizabeth A. Farmer ("Farmer" or "Respondent") filed a Summons and Complaint in the Court of Common Pleas in Kershaw County against James Timothy Short ("Short" or "Appellant") seeking a partition pursuant to section 15-61-10 of the South Carolina Code on property for which the parties own as joint tenants with the right of survivorship. ("Complaint"). (*See* July 17, 2020 Complaint). On August 14, 2020, Short timely filed his Answer and Counterclaim, alleging a general denial and counterclaiming against Farmer requesting a partition and private sale and alleging causes of action for ouster, accounting, and a right of inspection. ("Answer and Counterclaim") (*See* August 14, 2020 Defendant's Answer and Counterclaim). Farmer timely filed a Reply to Defendant's Answer and Counterclaim on September 2, 2020 ("Reply"). (*See* September 2, 2020 Plaintiff's Reply).

On December 4, 2020, Farmer filed a Motion for A Writ of Partition and nominated certain commissioners to serve pursuant to Rule 71(f) of the South Carolina Rules of Civil Procedure ("Motion for Writ of Partition"). (*See* Motion for Writ of Partition dated December 4, 2020). Contemporaneously, Farmer filed a Motion for an Order of Reference requesting that the underlying matter be referred to The Honorable Jeffrey M. Tzerman, Master-in-Equity for Kershaw County ("Motion for an Order of Reference"). (*See* Motion for an Order of Reference dated December 4, 2020). On March 22, 2021, in advance of the scheduled hearings on Farmer's Motion for Writ of Partition and Motion for an Order of Reference, Short filed a Memorandum in Opposition to Motion for a Writ of Partition and Appointment of Commissioners on March 22, 2021 ("Memorandum in Opposition"). (*See* Memorandum in Opposition to Motion for Writ of Partition and Appointment of Commissioners dated March 22, 2021). Farmer's motions were heard by The Honorable Alison Renee Lee on March 29, 2021 and shortly thereafter Judge Lee

issued a Form 4 Order referring this matter to the Kershaw County Master-in-Equity and further ordered that the Master-in-Equity shall hear Farmer's Motion for Writ of Partition ("Judge Lee Form-4 Order").

On August 5, 2021, the Honorable Jeffrey M. Tzerman conducted a bench trial on the cause of action alleged by Farmer and the counterclaims as filed by Short. The parties presented multiple witnesses, including appraisers, a realtor, a registered land surveyor, and the litigants also testified. On January 26, 2022, Judge Tzerman issued a Final Order in this matter, ordering that the property that was the subject of the dispute to be partitioned in kind and "denying all further requests of relief raised by the pleadings." (*See* Judge Tzerman Final Order dated January 26, 2022). On February 4, 2022, Short timely filed his Motion to Alter or Amend and for Reconsideration of Judge Tzerman's Final Order. ("Motion for Reconsideration") (*See* Motion to Alter or Amend and for Reconsideration). On June 23, 2022, the Master-in-Equity (the "Master") entered a Form-4 Order denying Short's Motion for Reconsideration. (*See* June 23, 2022 Order).

On July 22, 2022, Short timely filed his Notice of Appeal from the "Orders of the Honorable Jeffrey M. Tzerman" and included a copy of the orders referenced in the Notice of Appeal. (*See* July 22, 2022 Notice of Appeal).

STATEMENT OF THE FACTS

Respondent is a citizen and resident of Kershaw County. Appellant is a citizen and resident of the Commonwealth of Virginia. Following his wife's passing in December 2017, Appellant added his daughter, the Respondent, to bank accounts and the title to real and personal property. (Tr. P. 229-231). Appellant testified that he took these actions for estate planning reasons in order to prevent his estate being probated. (Tr. P. 231, L. 16 - P. 232, L. 6). On February 8, 2018, Appellant purchased a fifty-five (55) acre tract of land located in Kershaw County at 1301

Kellytown Road, Lugoff, SC 29078 (the "Property"). Respondent did not contribute any monetary amount of the total purchase price of $275,000. (Tr. P. 209; Tr. P. 269, L. 11). In keeping with his recent prior practice, Appellant titled the property jointly with his daughter, the Respondent, as "joint tenants with the right of survivorship and not as tenants in common" for estate planning purposes.

After the purchase of the Property, Respondent moved quickly to establish a residence on the property—moving in the second week of August 2019 before her children went back to school. (Tr. P. 143, L. 11-14). While it was the subject of much dispute as to what the residence on the Property was called (shed, building, workshop), it is undisputed that the building in which Respondent resided on the Property has living quarters that consists of four bedrooms, one and a half bathrooms, a kitchen, laundry room, and a den area. (Tr. P. 295). This is the location where Respondent moved into, where Appellant stayed on his visits, and where Respondent currently lives with her family. It is important to note that the entrance to both the residence and the Property itself is accessible only by one driveway at which a locked gate precludes entry to the Property. This particular Property is bordered on its Southern side by some wooded area and Twenty-Five-Mile creek, intermittent and regular streams and buffers on the Eastern and Western side, and a ditch frontage along Kellytown Road which necessitates entry to the Property only through the locked driveway. (Tr. P. 73-74; Tr. P. 117-118).

The parties have had several disagreements which has resulted in litigation in numerous venues, including a claim and delivery in Kershaw County Magistrate's Court (Civil Action No. 2021CV2810100407), a claim and delivery action in the Court of Common Pleas (Civil Action No. 2020-CP-28-00485), and a partition action Respondent brought against Appellant in West Virginia for property in which Mr. Short added his daughter to the title to the real estate in April

2018. (West Virginia Civil Action 21-C-15). At issue on this appeal, however, is whether the Master erred in failing to find that Appellant was ousted from the Property and therefore further failed to properly compensate Plaintiff for the aforementioned ouster.

It is uncontroverted that Respondent turned out and excluded Appellant from entering and possessing real property which was titled in his name. Prior to any actions being filed between the parties, Appellant attempted to retrieve his tractor and was refused entry to the Property with law enforcement informing Appellant that his tractor was sold.[1] (Tr. P. 262, L. 13-20). Absent two court orders stemming from the claim and delivery actions allowing Mr. Short to retrieve personal property items and one occasion accompanying the appraiser for this underlying action, Appellant has not been allowed back on the Property since January 2020; a total period of nineteen months to the date of the hearing in this matter.[2] (Tr. P. 262, L. 1- P. 263, L. 1). Importantly, in each of the court orders, law enforcement was present to effectuate the transfer of the tangible property and Mr. Short was not allowed onto the actual Property itself. (Tr. P. 261, L. 20-25). Since January 2020, Respondent has locked the gate to the Property and failed to provide a key or combination to Appellant despite Mr. Short having demanded keys and access to the Property. (Tr. P. 263, L. 5-25). Respondent has refused Appellant's entry onto the property and has been utilizing the Property on her own to the exclusion of Mr. Short. (Tr. P. 263, L. 12-15). Moreover, Respondent has lived on this Property rent free since Appellant purchased it, but more importantly to the exclusion of Appellant since his last access in January 2020 (P. 263, L. 16-18). Appellant testified—without objection or contravention—that this type of parcel could be rented for $1,500 a month given the amenities attendant to this unique property—hunting privileges, equine

[1] Appellant later learned in adjacent litigation that this statement Respondent informed law enforcement that day was patently false. The tractor at issue was removed from the Property and hidden at a family friend's property. (Tr. P. 262, L. 16-20).
[2] As of the date of the filing of this brief, Appellant has still not been permitted on the Property.

boarding, and other recreational activities. (Tr. P. 264, L. 11-17). There is no evidence in the record from Respondent or her witnesses contradicting Appellant's assertion of ouster or justifying Respondent's actions in excluding Appellant from the Property.

STANDARD OF REVIEW

An action for partition is equitable in nature. Wilson v. McGuire, 320 S.C. 137, 140–41, 463 S.E.2d 614, 616 (Ct. App. 1995). "In an appeal of an equitable action tried before a Master authorized to enter final judgment, this court must review the entire record and make its own findings of fact in accordance with the preponderance of the evidence." Ellis v. Smith Grading & Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988).

ARGUMENT

I. The Master Erred in Refusing to Charge Respondent with the Value of her use and occupation of the Property after Appellant was Ousted from the Property.

a. There is no evidence in the record to support the Master's Finding to Deny Appellant's Request for Relief from the Cause of Action of Ouster.

As a threshold matter, the only evidence in the record is that Respondent exclusively possessed the Property adverse to the rights of the Appellant. Respondent never once addressed Appellant's counterclaim for ouster throughout the underlying proceeding. See Jefferies v. Phillips, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994)("The appellate court will correct any errors of law, but it must affirm the master's factual findings **unless no evidence exists that reasonably supports those findings**.")(emphasis added). There is no evidence to support the Master's finding.

In filing his Answer and Counterclaim, Appellant outlined, with specificity, his third defense and counterclaim, the allegation of ouster, accounting, and right to inspection. In her Reply, the Respondent never even addressed Appellant's allegation of ouster. Additionally, the only testimony in evidence on the issue of ouster is from Appellant. The Appellant testified that

since the parties' dispute, he has not been allowed back on the property "without having a – a deputy or somebody—somebody else present" (Tr., P. 261, L. 20-25) or absent a court order. (Tr., P. 262-263, L. 21-1). Appellant further testified that he was kicked off the property, that there was a locked gate at the front of the property, and that he did not have a key or combination to the lock. (Tr., P. 263, L. 2-15). Neither the Respondent nor any of her witnesses addressed the issue of ouster. Moreover, Respondent's counsel did not even question Appellant on the issue of ouster during cross-examination. Respectfully, the Master's ruling in this particular matter shows a disregard for the testimony that was presented and the court committed an error of law on this matter. There is no evidence in the record to support Judge Tzerman's finding on this issue. See also Twelfth RMA Partners, L.P. v. National Safe Corporation, et. al., 335 S.C. 635, 518 S.E.2d 44 (1999)("The appellate court will correct any errors of law, but it must affirm the master's factual findings unless no evidence exists that reasonably supports those findings."). Accordingly, Appellant respectfully requests that this Honorable Court find that Respondent's actions amount to ouster and compensate Appellant for Respondent's exclusive use and possession of the Property adverse to the rights of Appellant.

b. The Appellant met his burden of showing Respondent Ousted him from the Property.

The Appellant is entitled to an offset of Respondent's exclusive use and occupation of the Property due to Respondent's actions in ousting Appellant from the Property. This Court's decision in Freeman v. Freeman provides a summary of "ouster" under South Carolina law:

> "Ouster" is the actual turning out or keeping excluded a party entitled to possession of any real property. Grant v. Grant, 288 S.C. 86, 340 S.E.2d 791 (Ct.App. 1986). The possession of one tenant in common is the possession of all and, for one tenant to establish title against a cotenant by adverse possession, he must overcome the strong presumption that he holds possession in recognition of the cotenancy. Felder v. Fleming, 278 S.C. 327, 295 S.E.2d 640 (1982); Horne v. Cox, 237 S.C. 41, 115 S.E.2d 513 (1960). Actual ouster of a tenant in common by a cotenant in possession

> occurs when the possession is attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits. Woods v. Bivens, 292 S.C. 76, 354 S.E.2d 909 (1987); Brevard v. Fortune, 221 S.C. 117, 69 S.E.2d 355 (1952). The acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable. Felder [v. Fleming], 278 S.C. [327] at 330, 295 S.E.2d [640] at 642 [(1982)]. Only in rare, extreme cases will the ouster by one cotenant of other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property. Id., 278 S.C. at 331, 295 S.E.2d at 642.

323 S.C. 95, 473 S.E.2d 467, 470–71 (Ct. App. 1996).

This particular case is analogous to a leading case analyzing ouster under South Carolina case law—Parker v. Shecut, 349 S.C. 226, 562 S.E.2d 620 (2002). In Parker, a brother and sister inherited as tenants in common a beach house in Edisto Island. 562 S.E.2d at 621. The siblings maintained the beach house as rental in which they shared in the profits thereof. Id. at 621–22. Without consultation with the sister, the brother made the beach house his primary residence, ceasing its use as a rental. Id. at 622. The brother changed the locks and advised the sister that "she was not welcome to use the beach house." Id. Prior to the changing of the locks, the sister "had access to the beach house when it was not being rented." Id. The brother also testified that he would not give the sister a working key to the beach house unless ordered by the court to do so. Id. at 623. The Supreme Court of South Carolina held that the actions of the brother in Parker were sufficient to disseize the sister from the beach house and "clearly evince his claim of exclusive right and denial of [the sister's] right to use the property." Id. Therefore, the Supreme Court of South Carolina held that the sister was entitled to rent in the value proportionate to her ownership in the beach house as of the date the brother changed the locks. Id.

In the instant matter, like the brother in Parker, Respondent has made the Property her primary residence to the exclusion of Appellant. Although Appellant resided in Virginia, Appellant

testified he would come down for days on end—sometimes 10-12 days at a time—to work on the Property prior to the dispute with his daughter which forced him off the Property. (P. 260, L. 1-7). Appellant and Respondent also testified that the parties had permits from the South Carolina Department of Health and Environmental Control completed on the Property so that Appellant could build a home to be near his daughter and grandkids. (Tr. P. 180, L. 6-9). Additionally, Appellant was instrumental in erecting the turnout shed and fencing on the Property—all evincing Appellant's intent to ultimately reside on the Property. (Tr. 241, L. 4-24). After the parties' fight, Respondent denied Appellant access to the Property—as well as his tangible items he acquired through various court orders—by locking the gate and refusing to provide Appellant a key or the combination to the gate. (Tr. P. 263, L. 5-11). The situation was so tumultuous that law enforcement was present on the few occasions that Appellant visited the Property and, even then, he was not permitted to go past the locked gate. In short, like in Parker, prior to locking the gate, Appellant had access to the Property.

In its order, the trial court erroneously relied upon Jones v. Masssey, 14 S.C. 292 (1880), a pre-Civil War case which also addressed an undivided share of slaves. Moreover, the trial court inaccurately maintained that there be a requirement that ouster be made by force. (Judge Tzerman Order, P. 7). This is an inaccurate understanding of the applicable law and further solidifies the misguided finding of the trial court which must be overturned by this Honorable Court. As noted, "'ouster' is the actual turning out or keeping excluded a party entitled to possession of any real property." Freeman, 323 S.C. at 99, 473 S.E.2d at 470. "**By actual ouster is not meant a physical eviction**, but a possession attended with such circumstances as to evince a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits." Woods, 292 S.C. at 80, 354 S.E.2d at 912 (emphasis supplied). Moreover, "[t]he acts relied upon to establish an

ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to disseize is clear and unmistakable. Felder, 278 S.C. at 330, 295 S.E.2d at 642. As discussed more fully herein, Appellant was actually ousted from this property. Since January 2020, Appellant has not been allowed to return to the property that he owns absent a court order or to accompany his appraiser as part of this case. In fact, law enforcement has been present (or was called) on each occasion that Appellant went to the property that he owned. Mr. Short has been both physically and constructively turned out from possession of his property. The only way onto the Property was through one driveway and a gate was erected, locked, and Respondent refused to provide access despite Appellant's repeated requests. Again, there is no evidence in the record which refutes Appellant's testimony. Accordingly, Appellant respectfully requests that this Honorable Court find that Respondent's actions amount to ouster and compensate Appellant for Respondent's exclusive use and possession of the Property adverse to the rights of Appellant.

CONCLUSION

For the reasons stated more fully herein, Appellant requests that this Honorable Court issue an opinion consistent with the uncontroverted facts presented in the trial of this case finding that Respondent ousted Appellant from the Property and enter an award of damages to the Appellant consistent with the only testimony presented for the period from January 2020 until an opinion is rendered by this Honorable Court.

Respectfully submitted,

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Elizabeth A. Farmer………………………………………………………Respondent,

v.

James Timothy Short…………….……………………………………….Appellant.

PROOF OF SERVICE

The undersigned certifies that, on August 22, 2022, a copy of the Initial Brief of Appellant and Appellant's Designation of Matter to be included in the Record on Appeal have been served upon counsel of record for the Respondent via electronic mail using the email addresses listed in the Attorney Information System as set forth below:

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RE: Elizabeth A. Farmer v. James Timothy Short
Appellate Case No.: 2022-001041

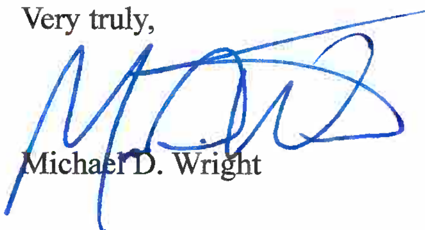
Dear Mrs. Kitchings:

I hope this correspondence finds you doing well.

Please find enclosed for electronic filing and service the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal as well as accompanying proof of electronic service. I ask that you have someone from your office provide me with a file stamped copy of the same. By electronic copy of this letter, I am serving all counsel of record of my correspondence with the court and a copy of the aforementioned filings.

If you have any questions, please do not hesitate to contact me.

Very truly,



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Enclosures as Stated

cc: John Wells, Esquire (via electronic mail)